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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 19-81:

LEWISTOWN EDUCATION ASSOCIATION,)
MEA,)

Complainant,)

- vs -)

FINAL ORDER

FERGUS COUNTY SCHOOL DISTRICT)
NO. 1, LEWISTOWN, MONTANA,)

Defendant.)

* * * * *

The Findings of Fact, Conclusions of Law and Recommended Order were issued by Hearing Examiner Kathryn Walker on February 2, 1982.

Exceptions to the Findings of Fact, Conclusions of Law and Recommended Order were filed by Emilie Loring, Attorney for Complainant, on February 17, 1982.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions of Complainant to the Findings of Fact, Conclusions of Law and Recommended Order are hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the Findings of Fact, Conclusions of Law and Recommended Order of Hearing Examiner Kathryn Walker as the Final Order of this Board.

DATED this 1st day of March, 1982.

BOARD OF PERSONNEL APPEALS

By John Kelly
John Kelly, Esq.
Chairman

STATE OF MONTANA
 BEFORE THE BOARD OF PERSONNEL APPEALS
 IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 19-81:
 LEWISTOWN EDUCATION ASSOCIATION, MEA,
 Complainant,
 - versus -
 FERGUS COUNTY SCHOOL DISTRICT NO. 1,
 LEWISTOWN, MONTANA,
 Defendant.

FINDINGS OF FACT,
 CONCLUSIONS OF LAW,
 AND RECOMMENDED ORDER.

* * * * *

On May 18, 1981, the Lewistown Education Association, MEA, filed an unfair labor practice charge with this Board alleging that Fergus County School District No. 1 had violated section 39-31-401(5) MCA by making unilateral changes in working conditions without bargaining with Complainant regarding the business leave provision in the parties' collective bargaining agreement, and had violated sections 39-31-401(3) and (5) MCA by refusing to accept grievances filed by Complainant.

On May 29, 1981, this Board received the Defendant's Answer denying those charges.

Even though this unfair labor practice charge involved questions of contract interpretation, this matter was not deferred under the Collyer doctrine because the parties' collective bargaining agreement did not provide for binding arbitration, a prerequisite for Collyer deferral.

The pre-hearing conference and hearing in this matter were held September 10, 1981, in Lewistown, Montana. They were held under the authority of section 39-31-406 MCA and as provided for by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA. Kathryn Walker was the hearing examiner. Enlie Loring of the law firm of Hilley and Loring represented the Complainant. Bradley Parrish, Fergus County Deputy County Attorney, represented the Defendant.

This matter was deemed submitted on the day the last brief was filed with this Board, October 20, 1981.

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1 Through meetings and individual discussions, he has relayed this understanding
2 to the School District's principals, who are charged by the provision's
3 language with authorizing business leave, and has instructed them to grant
4 or deny requests for business leave accordingly.¹

5 4. In 1974, Leonard Mapston, a teacher for the School District, requested
6 and was granted business leave by then-Principal Rafter. Mr. Mapston did not
7 offer and was not requested to supply a reason for taking this leave.

8 5. James Carroll, a teacher for the School District, took business
9 leave approximately three times when Mr. Rafter was principal. Mr. Carroll
10 explained the reasons for the requests if he wanted to, but was not asked to
11 supply the reasons.

12 6. In November, 1978, Mr. Mapston was granted business leave by then-
13 Principal Capps although he offered no reason for the request and none was
14 asked.

15 7. On August 1, 1979, Robert Raver became principal of the School
16 District's high school. At that time there were no written guidelines re-
17 garding the authorization of business leave. However, as a result of dis-
18 cussions with Superintendent Mattson, it was Principal Raver's understanding
19 that business leave wasn't for "personal leave" and was to be used for the
20 conduct of business that couldn't be taken care of during school hours that
21 wasn't in conflict with Article VI of the contract. He was specifically told
22 by Superintendent Mattson to ascertain the general reason for the request for
23 business leave.

24 8. In March, 1981, Mr. Mapston requested business leave from Principal
25 Raver. He gave advanced notice, a substitute was available, and he supplied
26 the reason for his request when Principal Raver asked. Principal Raver denied
27

28 ¹Article VI of the parties' 1980-81 contract states:

29
30 *Other employment. A teaching employee in District Number One shall*
31 *take no other employment which interferes in any way with the job*
32 *of teaching or assigned extra curricular duties.*

1 Mr. Mapston's request because it was not for the conduct of business.²

2 9. In March, 1981, James Hamling, a teacher for the School District,
3 requested business leave of Principal Raver's assistant (Principal Raver
4 was out of town). Even though Mr. Hamling gave advanced notice, a substitute
5 was available, and the reason for the request was generally known, his
6 request was denied.³

7 10. Since he has been principal for the School District, Principal
8 Raver has had approximately six applications for business leave. He has asked
9 the reasons for the requests when the applicants haven't volunteered the
10 information, and has denied some of the requests (in addition to the requests
11 of Mr. Mapston and Mr. Hamling described above, there was mention of the
12 denial of a Mr. Ellestad's request for business leave).

13 11. From the time it was incorporated into the contract in 1972 or
14 1973 until 1981, there were no written guidelines regarding business leave.

15 12. On January 12, 1981, the School District's Board of Trustees
16 approved the following "Guidelines for Administration of Business Leave":

17 GUIDELINES FOR ADMINISTRATION OF BUSINESS LEAVE:

18 In the past, there have been questions concerning the equitable
19 application of the District business leave policy for teaching personnel.
20 Those questions have been posed by both those persons who were respon-
21 sible for its administration and those persons who were its beneficiaries.
The following is a copy of the policy and guidelines to assist in the
administration of the policy:

22 POLICY:

23 Business Leave: Two (2) days business leave per school year shall
24 be authorized each teaching employee by the Principal subject to
25 availability of substitute and advanced notice need for this leave.

26 ²Mr. Mapston had requested the business leave to watch his son play in
27 an out-of-town basketball tournament. Even though his request for business
28 leave was denied, he was allowed to attend the tournament as a chaperone at
no loss of pay.

29 ³Mr. Hamling had requested the business leave to referee an out-of-town
30 basketball tournament. His request for business leave was denied because, in
31 the opinion of the School District, the reason was in conflict with Article
32 VI of the contract. However, Mr. Hamling was allowed to take professional
leave to referee the tournament. The amount of pay he received for refereeing
was deducted from his pay.

One day of substitute's pay will be deducted from the teaching employee salary for each day of authorized business leave.

GUIDELINES:

1. "Business Leave" is interpreted to be that type of activity that requires the personal attention of the employee. It is an activity that affects the economic and/or family welfare of the employee that cannot be attended to other than during the normal working hours of the school day. Such leave must not be related to other employment outside of District assignment.
2. "Business Leave" is not intended to provide time for gainful employment outside of the District job assignment or activities that could be construed as being related to other employment.
3. Leave for recreational activities such as hunting, skiing, fishing, vacationing, etc., may not be counted as business leave.
4. It should be emphasized that the uninterrupted guidance and direction of the student's educational efforts by the regular teacher is an important component of the instructional program. The teacher's absence from the classroom for non-instructionally related activities should be minimized to the greatest degree possible.

EXAMPLES OF "BUSINESS LEAVE" THAT TYPICALLY MAY BE APPROVED:

- activities involved in the purchase of a home that must be completed during office hours of other agencies that conflict with regular school hours
- illness in the immediate family not covered under bereavement type leaves
- legal or judicial appointments related to family or personal affairs (jury duty is excluded from this policy - it is covered by law)
- weddings of immediate family
- funerals for family that are not covered by bereavement policy
- activities requiring meeting with bank official or loan agency officials to transact financial business
- commencement exercises of immediate family
- interviews for professional employment in education
- emergency situations such as: flooded basement, broken water heater, fire, inoperative home heating systems, automobile accident, etc.
- The above list is intended as typical examples but "business leave" is not necessarily limited strictly to these specific items.

13. These guidelines were prepared by Superintendent Mattson with input from the School District's principals and the Association's Professional

1 Rights and Responsibilities Committee (its PR&R Committee).

2 14. Before these guidelines were finalized, they were submitted to the
3 Association's PR&R Committee for input. Some of the suggestions of the
4 Committee were incorporated nearly verbatim into the guidelines. However,
5 the PR&R Committee never formally agreed with the guidelines. According to
6 PR&R Committee member Carroll, the Committee thought it would have more input
7 into the guidelines before they were actually finalized.

8 15. When the guidelines were being developed, there was some objection
9 by the Association or some of the teachers as to what some of the guidelines
10 were, i.e., the substance of the guidelines. However, when the guidelines
11 were being developed neither the Association nor any of the teachers made any
12 formal objection to the School District's right to formulate the guidelines.

13 16. There were no formal negotiations regarding these guidelines between
14 the Association and the School District before the guidelines were adopted.

15 COUNT 11

16 17. The parties' 1980-81 collective bargaining agreement defines
17 "An Aggrieved Person" as "a person, or group of persons asserting a grievance."

18 18. The Association believes it has both a contractual right to file
19 grievances (as a "group of persons") and a statutory right to file grievances
20 (as the exclusive representative of the teachers and as a party to the
21 collective bargaining agreement).

22 19. The School District thinks the Association does not have the right
23 to file grievances. It bases this position on the parties' 1976 negotiations.
24 At those negotiations the Association proposed several changes to the con-
25 tract's grievance procedure, including modification of the definition of
26 "grievant" to specifically include the Association. During the course of
27 negotiations, the Association dropped its whole proposal relating to the
28 grievance procedure.

29 20. The only evidence on the record pertaining to the Association
30 filing grievances was elicited under cross examination of Association
31 witness Mapston. That testimony was, in its entirety:

1 Bradley Parrish (School District's representative): "Since 1966 has
2 the LEA [the Association] prosecuted as a grievant anything in front
3 of the Board of Personnel Appeals besides this case?"

4 Mr. Mapston: "Not that I'm aware of."

5 Mr. Parrish: "This is the very first time the LEA has ever been a
6 grievant in front of the Board of Personnel Appeals in your history?"

7 Mr. Mapston: "In my memory, yes."

8 Emilie Loring (Association's representative): "Excuse me, do you mean
9 the Board of Personnel Appeals or do you mean the School Board?"

10 Mr. Parrish: "Well, or the School Board to get to this point. Has the
11 LEA been a grievant as far as filing a grievance in front of the School
12 Board?"

13 Mr. Mapston: "I don't recall."

14 Mr. Parrish: "You haven't participated in that?"

15 Mr. Mapston: "No."

16 DISCUSSION

17 COUNT I

18 It is the hearing examiner's determination that Defendant School District
19 did not violate section 39-31-401(5) MCA by making unilateral changes in
20 working conditions without bargaining with Complainant Association regarding
21 the business leave provision in the parties' collective bargaining agreement.
22 Her reasons for this determination were:

23 1. The hearing examiner was persuaded that business leave was to be
24 authorized for some business-related reason. This determination was supported
25 by the plain language of the contract, i.e., the provision's title, and
26 Association witness Carroll's description of the original negotiation of the
27 business leave provision.

28 2. To be sure, testimony of Association witnesses indicated that
29 Principal Haver's predecessors had, on several occasions, been lenient and/or
30 trusting in authorizing business leave. However, the record did not establish
31 that a "past practice" or understanding between the Association and the School
32 District had developed which left the reason for business leave entirely to
the requesting employee's discretion or made authorization of the business
leave "automatic" if a substitute were available and advanced notice were
given.

1 When considering this point the hearing examiner carefully evaluated
2 Association witnesses' testimony about their personal experiences regarding
3 the School District's administration of business leave. However, she gave
4 little weight to their testimony about leaves granted to other teachers
5 because that testimony was not specific as to what kinds of leaves had been
6 authorized.

7 Secondly, the hearing examiner was mindful that for a past practice
8 to be binding on both parties it must be unequivocal, clearly announced and
9 acted upon, and readily ascertainable over a reasonable period of time as a
10 fixed and established practice accepted by both parties. (Elkouri and
11 Elkouri, How Arbitration Works, page 391).

12 3. Having determined that business leave was to be used for some
13 purpose related to business, the hearing examiner noted that the contract
14 did not define the term "business" and that it made the School District's
15 principals responsible for authorization of the leave. She therefore found
16 that the School District had a legitimate interest in developing standards
17 or guidelines by which the provision could be administered consistently and
18 in a manner contemplated by the parties at the bargaining table.

19 Superintendent Mattsen's testimony that such standards had been developed
20 in unwritten form and that the principals had been instructed of these
21 standards was not refuted by testimony that the instructions had not always
22 been carefully followed.

23 4. In 1981 the School District developed written guidelines for the
24 administration of business leave. This was not improper so long as the
25 written guidelines (a) were based on a reasonable interpretation of the
26 contract, (b) reflected the meaning of the provision as it had been
27 negotiated, and (c) did not depart in substance from the administration of
28 the provision under the unwritten guidelines.

29 After careful study of the guidelines themselves and consideration of
30 the relevant testimony, the hearing examiner determined that the written
31 guidelines met these criteria. She therefore found that the School District
32

1 had not illegally implemented a change in working conditions regarding the
2 business leave provision of the contract when it adopted the written
3 guidelines regarding its administration.

4 COUNT II

5 It is the hearing examiner's determination that Defendant School District
6 did not violate sections 39-31-401(1) and (5) MCA by refusing to accept a
7 grievance filed by Complainant Association.

8 The record clearly indicated the parties' dramatically opposing opinions
9 on whether the Association has the right to file a grievance. However, the
10 record was completely void of any evidence that either party had ever taken
11 any action relative to this issue. There was no evidence that the Association
12 had ever filed or attempted to file a grievance; conversely, there was no
13 evidence that the School District had ever refused to accept an Association-
14 filed grievance or had ever engaged in any interfering, restraining, or
15 coercive activity when the Association had attempted to file a grievance.

16 Nor was there any evidence that the Association had never filed or
17 attempted to file a grievance because it assumed, based on its knowledge of
18 the School District's position, that the School District would refuse to
19 accept such a grievance; that it had considered filing a grievance but had
20 decided not to do so because it thought such action would be futile.

21 There was simply no evidence on the record that an incident had ever
22 occurred over which the Association had even wanted to file a grievance.

23 For the hearing examiner to have found merit in this unfair labor
24 practice charge, she would have had to assume what the parties would do and
25 would think if a grievable situation were to occur. She could not base her
26 determination in this matter on such speculation. Therefore, absent any
27 specific information regarding the Association's filing or attempted filing
28 of a grievance, she had no choice but to dismiss this unfair labor practice
29 charge for lack of foundation.

30 Nor will the hearing examiner offer her opinion on the validity of the
31 parties' positions on this question. To do so would be improper because her
32 authority in this matter is derived from section 39-31-405 MCA, a provision

1 of the Act which addresses unfair labor practices. However, she will suggest
2 that the parties resolve this question through negotiations or seek a
3 declaratory ruling pursuant to section 2-4-501 MCA.

4 CONCLUSIONS OF LAW

5 1. Defendant Fergus County School District No. 1, Lewistown, Montana
6 did not violate section 39-31-401(5) MCA by making unilateral changes in
7 working conditions without bargaining with Complainant Lewistown Education
8 Association, NEA regarding the business leave provision in the parties'
9 collective bargaining agreement.

10 2. Defendant Fergus County School District No. 1, Lewistown, Montana
11 did not violate sections 39-31-401(1) and (5) MCA by refusing to accept
12 grievances filed by Complainant.

13 RECOMMENDED ORDER

14 This unfair labor practice charge is hereby dismissed.

15 NOTICE

16 Exceptions to these Findings of Fact, Conclusions of Law, and Recommended
17 Order may be filed with the Board of Personnel Appeals, Capitol Station,
18 Helena, Montana 59620 within twenty days of service.

19 If no exceptions are filed, the Recommended Order shall become the Final
20 Order of the Board.

21 DATED this 2nd day of February, 1982.

22 BOARD OF PERSONNEL APPEALS

23 Kathryn Walker
24 Kathryn Walker
25 Hearing Examiner

26 CERTIFICATE OF MAILING

27 1. Kathryn Walker, do hereby certify and state that I
28 did on the 2nd day of February, 1982, mail a true and correct
29 copy of the above Findings of Fact, Conclusions of Law, and Recommended
30 Order to the following: